IN THE

SUPREME COURT OF THE UNITED STATES

APR 10 1974
JR., CLERK

October Term 1973

NO. 73-1368

THE NATIONAL CASH REGISTER COMPANY,
Petitioner,

vs.

NCR EMPLOYEES' INDEPENDENT UNION, et al.,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) IN OPPOSITION

PAUL H. TOBIAS
911 First National Bank Bldg.
Cincinnati, Ohio 45202
Attorney for Respondents

Of Counsel:

JOHN A. FILLION, Esq.
General Counsel
United Automobile, Aerospace &
Agricultural Implement Workers
of America (UAW)
8000 E. Jefferson Avenue
Detroit, Michigan 48214

GOLDMAN, COLE & PUTNICK
and WILLIAM R. JACOBS, Esq.
911 First National Bank Bldg.
Cincinnati, Ohio 45202

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

INDEX

	Page
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENT	
1. Under the doctrine of "the law of the case", the court properly decided not to reverse its prior determination.	4
2. The decision of the court ordering arbitration was correct and not an abuse of discretion.	5
3. The court's order, requiring arbitration on the *merits*, was correct and not an abuse of discretion.	8
4. This case is inappropriate for certiorari.	11
CONCLUSION	13

TABLE OF AUTHORITIES

Cases:	Page
Alexander v. *Gardner-Denver Co.*, 42 LW 4214 (Feb 19, 1974)	8
Asbestos Workers Local 66 v. *Leona Lee Corp.*, 434 F2 192 (CA5 1970)	5
Boone v. *Armstrong Cork Co.*, 384 F2 285 (CA 4 1967)	5
Boys Markets v. *Retail Clerks Union*, 398 US 235 (1970)	7
Burnett v. *New York Central Railroad Co.*, 380 US 424 (1965)	8
Collyer Insulated Wire, 192 NLRB No. 150 (1971)	7
Culpepper v. *Reynolds Metals Co.*, 421 F2 888 (CA5 1970)	8
Drake Bakeries v. *Bakery & Confectionery Workers Local 50*, 370 US 254 (1962)	10
Mason-Dixon Lines Inv. v. *Local 66*, 443 F2 807 (CA3 1971)	5
NCR v. *Wilson*, 35 LA 647 (1960)	6
Norwood v. *MacDonald*, 1420 S 299 (1943)	8
Operating Engineers v. *Flair Builders*, 406 US 487 (1972)	9, 10, 11
Republic Steel Corporation v. *Maddox*, 379 US 650 (1965)	7, 11
Roth v. *Northern Assurance Co., Ltd*, 32 Ill. 2d 40; 203 NE2 415, 16 ALR2 442 (1965)	8

Page

Singer v. *Scholz Homes, Inc.*, 36 OApp2d 125 (1973) . 9

Stewart v. *Stewart*, 97 US 361 (1878) 5

Textile Workers Union v. *Lincoln Mills*, 353 US 448 (1957) 5

United Steelworkers of America v. *American Mfg. Co.*, 363 US 564 (1960) 6

Vaca v. *Sipes*, 301 US 171 (1967) 10

Water Light & Gas Co. v. *City of Hutchison*, 160 F 41 (CA8 1908) 8

White v. *Murtha*, 377 F2 428 at 432 (CA5 1967) .. 4

John Wiley & Sons v. *Livingston*, 376 US 543 (1964) 9, 10, 11

Miscellaneous:

Vol. 5A *Corbin Contracts* Section 1225 (1971 ed.) .. 8

Vol. 1B *Moore's Fed. Practice*, pp. 401-409, 431-455 .. 4-5

29 USC Section 185 (a) 5

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1973

NO. ———

THE NATIONAL CASH REGISTER COMPANY,
Petitioner,

vs.

NCR EMPLOYEES' INDEPENDENT UNION, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF THE INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) IN OPPOSITION

QUESTIONS PRESENTED

1. When a union reasonably believes that a particular dispute arising under a strike settlement agreement is not subject to the arbitration procedure of the basic collective bargaining agreement, and, acting upon that belief, files suit for breach of the separate contract, may a federal court, upon finding that the dispute is arbitrable, order the parties to arbitration?

2. May the court, in the exercise of its equitable powers and for reasons relating to national labor policy and the functioning of courts, decide for itself that the case should be arbitrated on the merits, without regard to the con-

tractual time limits for requesting arbitration, where the bringing of the lawsuit was the reason for the alleged failure to comply with the time limits?

3. When both of the above mentioned issues are determined in the affirmative with the case remanded by the court of appeals and no attempt at rehearing or appeal is made, is it within the appellate court's discretion to refuse to overrule its prior decision when the case is again before its attention on a second appeal?

STATEMENT OF THE CASE

The petition adequately summarizes most of the essential facts. However some clarification is necessary.[1] The "work schedule" agreement upon which this suit was based, was dated December 14, 1968 – approximately one and one-half months before the basic labor agreement was signed January 30, 1969. The work schedule was not listed as a "supplement" to the contract, and it was physically and timewise separate from the basic labor agreement. Under the labor agreement an arbitrable grievance is defined as "a dispute between the parties as to the interpretation, application or alleged violation of *this agreement* including any supplements thereto". (Emphasis ours.) The work schedule had been performed long before the signing of the basic labor agreement, and was neither part of or a supplement to the agreement. The union as an organization had every reason to believe they could pursue their remedy in court without prior resort to arbitration.

---

[1] In 1971 the United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) became the bargaining representative for NCR's employees in Dayton and successor to the rights of the Independent Union with respect to this lawsuit.

Further, as a practical matter, the company received adequate and timely notice of the existence and nature of the grievance. The subject matter of the dispute had already been raised by eight individual grievances filed in 1968. The company rejected the claims. Thus the union gave the company every opportunity to settle the dispute in the course of the grievance procedure. The record does not recite the date of the union's receipt of the company's Step 5 reply to the grievance. However, part of the union's claim was for overtime pay on Saturday, January 4, 1969, and it is reasonable to assume that some of the grievances were still pending when the contract was executed on January 30, 1969. The union had 30 days to demand arbitration. In the meantime, the class action lawsuit covering 12,000 employees was filed in mid February, 1969. The lawsuit was intended as substitute for arbitration. Because of the pendency of the lawsuit, the union did not process the eight individual grievances to arbitration, and the time limits for demanding arbitration expired, during the course of this litigation.

The union pressed its argument that a court trial was the preferred remedy until it received the unfavorable decision from the district court in 1971. That point was the first occasion when the union learned that its choice of remedy was in error. The union in its brief then advised the company and the circuit court that it would accept arbitration as an alternative remedy.

ARGUMENT

1. Under the doctrine of "the law of the case", the court properly decided not to reverse its prior determination.

In its first decision, the Sixth Circuit on April 10, 1972 remanded the case to the District Court, with instructions that the court order arbitration in the event the dispute was found to be arbitrable.[2]

NCR did not move for a re-hearing or attempt to appeal from the first decision. Thus the first decision became the "law of the case". Subsequently the District Court held that arbitration, rather than court, was the proper forum for resolution of the dispute, and following the "law of the case" ordered arbitration. The Sixth Circuit, in its December 1973 decision, merely reaffirmed its earlier decision, in conformity with the "Law of the Case", which is to be followed unless the prior decision is "clearly erroneous and would work a manifest injustice". *White* v. *Murtha*, 377 F2 428 at 432 (CA5 1967); *Vol. 1B Moore's Fed.*

---

[2] The full text of that portion of the Court's opinion dealing with the issue reads as follows:

> "In the event the court proceeds in this manner and again concludes that arbitration is the exclusive remedy on the merits of plaintiffs' claim of violation of the "Work Schedule," we think that in the interest of justice and equity the court should direct the parties to proceed to arbitration on the violation issue rather than dismiss the action outright.[1] It follows that if the court should conclude that the plaintiffs' claim is not governed by any arbitration clause, it would then proceed to determine the plaintiffs' claim on the merits.

---

[1] The Court in this event should specify the applicable arbitration provision and its order should direct arbitration of the substantive issue without regard to any possible contractual time or other procedural limitations. To enforce its order the Court will retain jurisdiction pending arbitration."

Practice, pp. 401-409, 431-455. This court has acknowledged the salutory purpose of the doctrine of the "law of the case" in *Stewart* v. *Stewart*, 97 US 361 (1878), and for this reason should be particularly reluctant to review the merits of this petition.

2. The decision of the court ordering arbitration was correct and was not an abuse of discretion.

This was an action for breach of contract under Section 301 (a) of the Act (29 USC Section 185 (a)). The court's power to order arbitration, springs from its inherent equitable power, and also from the specific mandate of the *Lincoln Mills* case which empowers the federal courts to "fashion remedies" pursuant to national labor policy.[3] Federal courts have frequently ordered arbitration as a remedy in suits originally brought as damage actions under Section 301 (a). *Boone* v. *Armstrong Cork Co.*, 384 F2 285 (CA4 1967); *Asbestos Workers Local 66* v. *Leona Corp.*, 434 F2 192 (CA5 1970); *Mason-Dixon Lines, Inv.* v. *Local 66*, 443 F2 807 (CA3 1971).[4]

The "equities" in favor of arbitration were particularly powerful in the case at bar. The union never slept on its rights. Individual grievances were filed promptly, soon after the breach of contract arose. The union then filed its lawsuit on February 13, 1969, only two weeks after the new contract was signed on January 30, 1969.

---

[3] In *Textile Workers Union* v. *Lincoln Mills*, 353 US 448 (1957), the court held that in suits for violation of a labor agreement the courts must fashion the law "from the policy of our national labor laws. . . . The range of judicial inventiveness will be determined by the nature of the problem".

[4] The *Boone* case cited by the court below, involved a "misunderstanding by all parties concerned as to the availablity of the procedure" and the court remanded the damage suit, for exhaustion of contract remedies.

For a variety of reasons, the union believed that a court was the proper forum to resolve the dispute involving a separate strike settlement agreement and the claims of several hundred thousand dollars in damages.[5] The company disagreed, arguing that arbitration was the exclusive remedy. Consistent with its position, during the early stages of litigation the company "submitted a written agreement to the union to voluntarily arbitrate the merits involved in this case.[6] The company subsequently changed its position.

The court noted that "the union did not act unreasonably when it concluded that the schedule was not incorporated into the agreement and that its remedy was with the courts, not the grievance procedure". However, the lower court agreed with the company and held that arbitration was the proper remedy. The union did not cross-appeal from the District Court's ruling of January 1973 because by then — four years after the dispute arose — the union most of all desired a speedy expeditious ruling on the merits, without regard to which forum was to govern.

The company's argument, that the plaintiffs should now be forever barred from any hearing of their claim, is not only inconsistent with its earlier position but also would cause a monstrous result, at odds with national labor policy as reflected in the *Steelworkers* trilogy.[7]

---

[5] In a similar case involving a claim of breach of a strike settlement agreement, NCR refused to arbitrate, arguing that the grievance was not covered by the basic labor agreement. *NCR* v. *Wilson*, 35 LA 647 (NY Court of Appeals 1960).

[6] Quoted from the Company's memorandum contra plaintiff's additional evidence filed in the District Court, September 11, 1972.

[7] *United Steelworkers of America* v. *American Mfg. Co.*, 363 US 564 (1960), et seq.

Nothing in the *Republic Steel Corporation* v. *Maddox*, 379 US 650 (1965), is inconsistent with the decision herein. First of all in *Maddox* the plaintiff made no effort to utilize the grievance procedure. He waited three years before bringing his claim to the company's attention by his suit. Further, there was no question of substantive arbitrability or doubt that his claim was covered by the agreement. In addition, the court in *Maddox* was concerned with the problem of an individual who attempted to bypass the union and ruled accordingly. No such problem exists in the present case.

In addition Maddox never requested arbitration and the union as an organization was not even a party to the suit. The court never addressed itself to the issue of whether arbitration was a proper alternative remedy, but held only that the plaintiff could not maintain his suit for damages without prior attempted exhaustion of grievance remedies. Thus the *Maddox* case does not even touch the issue raised by the instant case.

There was nothing novel or extraordinary about the court's order of arbitration.[8] It was consistent with the equities, with national labor policy, with the position of the company, and within the range of remedial options available to the courts. (See cases cited p. 5, *supra*.)

---

[8] Other examples of national policy, encouraging arbitration on the merits as an alternative remedy where different forums are initially chosen are *Boys Markets* v. *Retail Clerks Union*, 398 US 235 (1970), where an order of arbitration accompanies an injunction against a strike, if the substantive issue is arbitrable and *Collyer Insulated Wire*, 192 NLRB No. 150 (1971), where the National Labor Relations Board defers unfair labor practice charges to arbitration.

3. The court's order, requiring arbitration on the merits, was correct and not an abuse of discretion.

The courts have an important interest in protecting and preserving access to courts for all those who reasonably and in good faith believe they have a claim within the court's jurisdiction. Requiring the parties to a labor agreement to make a final "election" of remedies, at the onset, can only result in the choking off of access to the courts. This court has dealt with a similar problem in *Burnett* v. *New York Central Railroad Co.*, 380 US 424 (1965), where a plaintiff's FELA suit was dismissed in state court because of improper venue. A subsequent filing in federal court, after the statute of limitations had run, was held not to bar suit. The court held that the basic inquiry was whether congressional purpose was effectuated by a rigid application of an election of remedies doctrine.

A similar result was reached in the famous case of *Culpepper* v. *Reynolds Metals Co.*, 421 F2 888 (CA5 1970), where the court held that a plaintiff who presses a claim in one forum, is not foreclosed from subsequent pursuit of a different remedy in another forum after the latter's time limits have expired and ruled "the statute of limitations which has been held to be a jurisdictional requirement (under Title VII of the Civil Rights Act) is tolled once an employee invokes his contractural grievance remedies."[9]

---

[9] For a recent example of the court's reluctance to rigidly apply the doctrine of election of remedies see *Alexander* v. *Gardner-Denver Co.*, 42 LW 4214 (Feb. 19, 1974). For other cases where the plaintiff mistakenly chose the wrong forum but was subsequently allowed to pursue the action in the correct forum see *Roth* v. *Northern Assurance Co., Ltd.*, 32 Ill. 2d 40, 203 NE2 415, 16 ALR3 442 (1965); *Water Light & Gas Co.* v. *City of Hutchison*, 160 F 41 (CA 8 1908); *Norwood* v. *MacDonald*, 142 OS 299 (1943). *See also* Vol. 5A *Corbin Contracts*, Section 1225 (1971 ed.). "It ought to be obvious that when a plaintiff erroneously thinks that a certain remedy is available to him,

The Sixth Circuit, in the instant case, in effect followed similar reasoning, holding that, the plaintiff by its unsuccessful efforts to exhaust grievance remedies, and by its timely lawsuit was, as a matter of equity, entitled to a decision on the merits in arbitration.

Defendant argues that the cases of *John Wiley & Sons* v. *Livingston*, 376 US 543 (1964), and its progeny, including *Operating Engineers* v. *Flair Builders*, 406 US 487 (1972), forbid the result herein.

The typical *Wiley-Operating Engineers* case involves a situation where a union originally demands arbitration, and is resisted by a company that claims the case is not arbitrable for procedural reasons, such as lack of timeliness or laches. The reverse position was taken in the case at bar. Here the union, from the onset, sought a determination of the merits in court and the company claimed the matter was exclusively reserved for arbitration.

Wiley and like cases involved unions that allegedly failed to act promptly in every respect and not out of mistake as to the proper remedy. Here the union acted promptly and the company was not prejudiced by failure to be notified of the union's claim. The reasoning of the *Wiley* doctrine is totally inapplicable. A primary purpose of *Wiley* was to prevent the long delay that would follow if companies could resist and delay arbitration on procedural grounds relying upon the court to decide these issues. No such incentive could operate in situations such as the present case.

The other rationale of *Wiley* was that matters of procedural arbitrability involving intrinsic questions of con-

---

his futile attempt to procure it by legal proceedings ought not to be described as an election between an alternative remedy".

For a recent Ohio case critical of the harsh election of remedies doctrine see *Singer* v. *Scholz Homes*, 36 OApp2d 125 (1973).

tract interpretation are more within the expertise of the arbitrator than the courts. In *Operator Engineers* the court similarly held that the defense of laches was a dispute specifically covered by the contract and should be decided by an arbitrator not a court.

Neither of these cases dealt with matters concerning the functioning of and access to the courts. Neither dealt with the question of whether a lawsuit is a fatal election of remedies, barring subsequent arbitration. *These questions could not be answered by an arbitrator but only by a court.* The arbitrator is bound by the four corners of the contract. He has neither the expertise nor authority to decide on issues relating to the operation of the courts.

There is nothing unusual about the court requiring arbitration on the merits as an alternative remedy in special situations, after contractural time limits have passed. One example was recognized in *Vaca* v. *Sipes*, 301 US 171 (1967), where in the event of an individual's suit for breach of contract and unfair representation, the court held "an order compelling arbitration should be viewed as one of the available remedies".

Another example is *Drake Bakeries* v. *Bakery & Confectionery Workers Local 50*, 370 US 254 (1962). There the company sued the union for breach of contract because of an illegal strike. The union never filed a grievance or demand for arbitration of the damage claim. Yet the court granted the union's motion for stay pending arbitration of the damage claim. This court rejected the company's argument that the union "had not proceeded with dispatch in seeking arbitration", holding similar to the sixth circuit in the instant case, that its action in *court*, in moving for a stay, was sufficent to invoke arbitration.

In the *Wiley*, *Operating Engineers* line of cases this court

has ruled that disputes concerning procedural arbitrability covered by the contract are generally for the arbitrator and not a court. The court below did not seek to change these well settled principles. The court merely decided that fundamental questions of interplay between the two forums – court and arbitration – and the bearing of national labor policy upon the election of remedies doctrine was a matter the court had the power and duty to resolve.

4. This case is inappropriate for Certiorari.

The peculiar and very special facts of the case at bar make it an inappropriate vehicle for expounding general principles of law.

First of all this suit did not involve the normal grievance, such as a discharge or seniority dispute. Furthermore, most unions seek arbitration in the first instance, and do not go directly to court. Generally it is the company, and not the union that initially claims the dispute is for the court and the arbitrator. Because the fact pattern is so unusual, any effort to formulate general rules applicable to other cases would be difficult.

There are other reasons for denying certiorari. Neither the plaintiff nor the court below expressly or by implication seek to change or modify the rules set forth in *Wiley*, *Operating Engineers*, or *Maddox*. Defendant's misguided attempt to build a "straw man" argument in order to create a conflict among the circuits should be transparent. *Furthermore, the result of the case conforms with traditional notions of fairness.* Defendants cite no substantive policy reasons why plaintiff should be denied the opportunity of a hearing on the merits. Their sole arguments are that the

union did not file a "timely" demand for arbitration, and that questions of contract interpretation involving procedural arbitrability are for the arbitrator. Yet the union's lawsuit (filed only two weeks after the contract was executed) was filed within time limits for demanding arbitration, and the company can claim no lack of notice of the union's desire to pursue its claim or resulting prejudice. Further, the matter before the court was not a routine question of procedural arbitrability involving interpretation of the contract (generally for the arbitrator) but, rather basic issues concerning the doctrine of election of remedies, national labor policy, and protection of those who reasonably seek court relief — all traditionally issues for a court.

CONCLUSION

There was no "manifest injustice" or "clear error" requiring the Sixth Circuit in 1973 to deviate from the "law of the case" established in its 1972 decision. The order furthers national labor policy in favor of arbitration and also furthers the policy of protecting the right of unhindered access to the courts.

Its ruling, allowing plaintiffs their full access to court and lifting any Draconian punishment for having mistakenly, but reasonably and in good faith, chosen the wrong forum avoided rather than constituted an injustice. After having extolled the virtues of arbitration in order to secure a dismissal of the suit, petitioners can hardly claim injustice in obtaining in effect what they asked for all along.

For all these reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

PAUL H. TOBIAS
911 First National Bank Bldg.
Cincinnati, Ohio 45202
Attorney for Respondents

Of Counsel:

JOHN A. FILLION, Esq.
General Counsel
United Automobile, Aerospace &
Agricultural Implement Workers
of America (UAW)
8000 E. Jefferson Avenue
Detroit, Michigan 48214

GOLDMAN, COLE & PUTNICK
and WILLIAM R. JACOBS, Esq.
911 First National Bank Bldg.
Cincinnati, Ohio 45202